

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
SBC Communications Inc.)
Petition for Waiver of)
Section 61.42 of the Commission's rules)
)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**SBC COMMUNICATIONS INC. PETITION FOR WAIVER
EXPEDITED TREATMENT REQUESTED**

Pursuant to Sections 0.91(b) and 1.3 of the Commission's rules, SBC Communications Inc., on behalf of the Pacific Bell Telephone Company, Southwestern Bell Telephone Company, The Ameritech Operating Companies, The Southern New England Telephone Company, and Nevada Bell Telephone Company (collectively "SBC"), requests a waiver of Section 61.42(f) to permit SBC to include its existing or any future packet-switched offerings¹ under price cap regulation in the special access basket, high capacity/DDS service category. The Wireline Competition Bureau ("Bureau") has delegated authority to waive the requirements of Part 61 of the Commission's rules and has exercised such authority on multiple occasions. As discussed further below, there is good cause for the Bureau to grant the waiver relief requested here. Expedited treatment of this Petition is requested to enable SBC to include its packet-switched services in price caps in its 2004 annual price cap tariff filing.

¹ Certain SBC incumbent telephone companies currently offer only two packet-switched services, BPON and OPT-E-MAN. Specifically, PB offers BPON and OPT-E-MAN while SNET, Ameritech and SWBT offer only OPT-E-MAN. The remainder of SBC's advanced services, which are not subject to this Petition for Waiver, are provided by SBC ASI. At this juncture, SBC does not have any immediate plans to offer additional advanced services through its telephone companies.

I. BACKGROUND

In the initial price cap order,² the Commission concluded that certain local exchange carrier ("LEC") services appearing in the LECs' federal tariffs should be excluded from price cap regulation because they "do not lend themselves to incentive-based regulation, or raise significant and controversial issues that should be resolved outside of the price cap arena."³ One type of the service specifically excluded was packet-switched services. The Commission determined that it was appropriate to exclude these services because unlike the other LEC services, packet-switched services "were not subject to scrutiny as part of [its] investigation of LEC productivity."⁴ To effectuate the exclusions, the Commission adopted Section 61.42(f) which specifically requires price cap LECs to exclude services from price caps that the Commission has designated or may later designate by order.⁵

Since adoption of the *1990 Price Cap Order*, SBC has consistently interpreted that order and Section 61.42(f) to exclude *all* packet-switched services from price cap regulation. BellSouth and other LECs, however, have interpreted the *1990 Price Cap Order* and Commission rule as permitting price cap LECs to include *new* packet-switched services under price cap regulation, absent a *post-1990* Commission order excluding such services from price caps.

Commission precedent certainly seems to imply that carriers can include packet-switched services without a waiver. In a 2001 Order, the Commission denied applications for review of

² Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) ("*1990 Price Cap Order*").

³ *Id.* ¶191.

⁴ *Id.* ¶195.

⁵ 47 C.F.R. §61.42(f).

the Common Carrier Bureau's grant of pricing flexibility to BellSouth, pricing flexibility that extended to packet-switched services.⁶ In support of its application for review, WorldCom argued that the Bureau did not have the authority to grant pricing flexibility for packet-switched services because the services should have been excluded from price cap regulation pursuant to the 1990 Price Cap Order.⁷ Because BellSouth included the contested packet-switched services in price caps in its 1996 annual price cap tariff filing pursuant to Section 61.42(g)⁸ and the services were subject to the Bureau's scrutiny, the Commission concluded that BellSouth's packet-switched services were properly regulated under price caps and were thus eligible for pricing flexibility.⁹

In another instance, the Bureau granted Verizon limited waivers of Section 61.42(g) in 2002 and 2003 to permit Verizon to *exclude* its advanced services, specifically the advanced services transferred from VADI (its advanced services affiliate), from price caps.¹⁰ A waiver seemingly would be unnecessary if Verizon were already *barred* from including its packet-switched services in price caps pursuant to Section 61.42(f).

⁶ BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, Memorandum Opinion and Order, CC Docket No.01-22 (October 3, 2000) ("*BellSouth Pricing Flexibility Order*").

⁷ *Id.* ¶14.

⁸ 47 C.F.R. § 61.42(g). It states, "New services, other than those within the scope of paragraph (f) of this section, must be included in the affected basket at the first annual price cap tariff following completion of the base period in which they are introduced. To the extent that such new services are permitted or required to be included in new or existing service categories within the assigned basket, they shall be so included at the first annual price cap tariff filing following completion of the base period in which they are introduced."

⁹ *BellSouth Pricing Flexibility Order*, ¶15.

¹⁰ Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules, 18 FCC Rcd 6498 (2003); Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38 and 61.49 of the Commission's Rules, Order, WCB/Pricing No. 02-16 (2002).

The overwhelming majority of SBC's packet-switched services are provided through SBC's affiliate SBC ASI, which has been granted forbearance relief from the Commission's tariffing requirements.¹¹ Despite this forbearance relief, in a limited number of circumstances — two to be exact — SBC concluded that it made more sense given existing infrastructure deployment and expended capital and resources to offer its OPT-E-MAN and BPON advanced services through one or more of the SBC telephone companies. In the highly competitive packet-switched services market, consumers have ample choices in broadband providers. Accordingly, it is paramount that SBC be positioned to respond quickly to changing market conditions and customer needs without burdensome cost support and advance notice requirements.

SBC recognizes that the Commission has initiated a proceeding to determine the regulatory treatment of incumbent LECs' broadband services under Title II, including whether it should forbear from dominant carrier regulation of those services.¹² If the Commission ultimately forbears from dominant carrier regulations for the ILECs' advanced services, which would encompass any tariffing or other pricing requirements, the waiver relief sought herein would be moot. But until that time, SBC needs the flexibility to compete in a competitive marketplace.

Price cap regulation offers carriers seeking to introduce new, innovative services the flexibility to respond to marketplace realities. Based on recent informal discussions with Bureau staff, it is not clear whether SBC's packet-switched services qualify as new services under price caps, or must be treated as non-price cap services subject to Sections 61.58(e) (15-days notice) and 61.38 (cost support requirements) of the Commission's rules. Thus, out of an abundance of

¹¹ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order (rel. Dec. 31, 2002).

¹² *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001).

caution, SBC is seeking a waiver of Section 61.42(f) so that it may include packet-switched services under price cap regulation and ultimately take advantage of the pricing flexibility afforded services subject to price caps. If granted, SBC will include these services in its special access basket, high capacity/DDS service category.

II. DISCUSSION

The Wireline Competition Bureau, pursuant to delegated authority, may waive the Commission's rules if special circumstances warrant a deviation from the general rules and such deviation would better serve the public interest than would strict adherence to the rules.¹³ The Bureau has exercised such authority on numerous occasions and waived Commission rules under Part 61, including Section 61.42.¹⁴ As SBC demonstrates below, special circumstances warrant a waiver of Section 61.42(f) to enable SBC to include its packet-switched services under price cap regulation.

The Commission's rationale for excluding packet-switched services from price cap regulation is no longer valid. Indeed, the only justification provided was, "packet-switched services were not subject to scrutiny as part of our investigation of LEC productivity."¹⁵ But clearly this is not the case today. The Bureau has every opportunity to examine *new* packet-switched services in the first price cap tariff filing following completion of the base period in which they are introduced, and appears to have engaged in such scrutiny on at least one occasion.¹⁶ Given that SBC's new packet-switched services would be subject to Commission

¹³ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 C.F.R. § 0.91.

¹⁴ See footnote 11, *infra*.

¹⁵ 1990 Price Cap Order ¶195.

¹⁶ *BellSouth Pricing Flexibility Order*, ¶ 15.

scrutiny, thereby fully addressing the Commission's asserted reason for excluding them in the first place, they should be treated like other new services and permitted to be included under price caps.

Certainly advanced services are entitled to the same regulatory flexibility accorded new services under price caps. Up until 1999, new services under price caps were subject to the new services test, which obligated price cap LECs to make cost support showings with their new service tariff filings and to file such tariffs on 15-days notice.¹⁷ The Commission streamlined these requirements in 1999 for new services, concluding that cost support and advance notice requirements unnecessarily delay the introduction of new services into the marketplace without any demonstrable public interest benefits, thus undermining two key goals of price cap regulation, innovation and the development of new services.¹⁸

Advanced services are precisely the type of new, innovative services the Commission envisioned when adopting price cap regulation, rendering burdensome cost support and advance notice requirements unwarranted. These services, like new services under prices caps, are typically the product of new technologies and often significantly expand the range of service options for customers – benefits the Commission has concluded are in the public interest. Importantly, like other new services, advanced services cannot adversely affect customers because customers are in no way compelled to purchase the service. Advanced services are completely optional, allowing the customer to decide whether the advanced service or an existing service better serves its needs.

¹⁷ *Access Charge Reform, et al.*, CC Docket No. 96-262, et al., Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 35 (1999).

¹⁸ *Id.* ¶ 37.

Further, advanced services are flourishing in the marketplace, and have been so for over a decade,¹⁹ demonstrating that consumers value these new offerings. In the larger business market segment, the three major nationwide providers of advanced services (AT&T, WorldCom and Sprint) collectively account for two thirds of the market in SBC's region.²⁰ These competitors are some of the largest telecommunications companies with their own networks and thus typically do not purchase SBC's ATM and frame relay services on a wholesale basis. SBC's potential customers, accordingly, have ample choices in providers. As the Commission has recognized, large business customers are highly demand elastic and have significant buying power.²¹ Accordingly, they can effectively protect their interests without the need for burdensome Commission regulation.

SBC has filed a petition and then comments in the Commission's *Title II* proceeding demonstrating that it is non-dominant in the provision of advanced services to mass market and larger business customers.²² Given SBC's non-dominant status in the broadband markets, the Commission should forbear from *any* form of tariff regulation of *any* of SBC's advanced

¹⁹ In the early 1990s, shortly after incumbent LECs began providing high-speed packet switching, the Commission concluded that incumbent LECs should not be required to file detailed cost-support information for "packet-switched services" given that "[t]he packet switching services market is . . . highly competitive." *Open Network Architecture Tariffs of Bell Operating Companies*, Order, 9 FCC Rcd 440, ¶ 68 (1993); see also *Southwestern Bell Telephone Company; Petition for Waiver of Section 64.702 of the Commission's Rules and Regulation to Provide and Market Asynchronous Conversion on an Unseparated Basis*, 5 FCC Rcd 161, ¶ 19 (1990).

²⁰ *SBC Petition for Expedited Ruling that it is Non-Dominant in Its Provision of Advanced Services and for Forbearance from Dominant Carrier Regulation of Those Services*, CC Docket No. 01-337, at 9, filed October 3, 2001 (*Non-Dominant Petition*).

²¹ *Non-Dominant Petition* at 9.

²² *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001); SBC Comments filed on March 1, 2002.

services, new or existing.²³ Such deregulation would of course render the waiver relief sought herein moot. However, pending forbearance relief in that proceeding, it is paramount that SBC have the flexibilities afforded under price cap regulation to respond quickly to changing market conditions and customer needs.

Without a waiver, SBC would have to continue treating its advanced services as non-price cap services, meaning it would be required to make a cost support showing every time it files a new packet-switched service tariff or modifies the pricing thereto, and on 15-days notice. Such requirements would prove costly and detrimental to consumers by unnecessarily delaying the introduction of new services and new prices into the marketplace. The Commission has explained that this delay not only imposes direct costs by delaying the availability of such services to consumers, but also indirect costs – by reducing first mover advantages normally available to innovating carriers and thereby diminishing the incentives of both the regulated carrier and its competitors to deploy innovative new service offerings.²⁴ Waiver of Section 61.42(f) would eliminate these public interest concerns, allowing consumers and SBC alike to avail themselves of the benefits afforded new services under price cap regulation.

If SBC's waiver request is granted, SBC will include its packet-switched services in the special access basket,²⁵ high capacity/DDS service category. This basket and service category contain SBC's highest capacity special access services at the fastest speeds, including SONET,

²³ Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271 (1995) (AT&T Reclassification Order or Non-Dominant Order); Tariff Filing Requirements for Non-Dominant Common Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993) (CLEC Non-Dominant Decision), vacated and remanded in part on other grounds, *SWBT v. FCC* 43 F.3d 1515 (DC Cir 1995), on remand, 10 FCC Rcd 13653 (1995).

²⁴ *Access Charge Reform, et al.*, CC Docket No. 96-262, et al., Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 38 (1999). See also *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, ¶ 78 (1991).

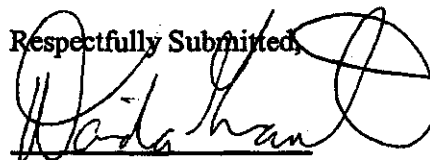
²⁵ BellSouth successfully included its packet-switched services in the special access basket in 1996.

GigaMAN, OCN Point-to-Point, and DSRS. SBC's two existing packet-switched services, OPT-E-MAN and BPON are analogous in many respects to these services. For example, OPT-E-MAN is similar to GigaMAN, which was introduced into the special access basket, high capacity/DDS service category in the 2003 Annual Filing, in that they are both fiber-based, Ethernet services. BPON is similar to OPT-E-MAN and GigaMAN in that it is a high speed fiber-based service. Moreover, SBC's packet-switched services are targeted to the same or similar customer base as its other high speed services in the high capacity special access/DDS service category and thus should be treated in the same manner under price cap regulation.

III. CONCLUSION

For the reasons set forth herein, SBC requests that the Commission waive Section 61.42(f) so that it may include its packet-switched services under price cap regulation in the baskets specified herein.

Respectfully Submitted,



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December 9, 2003